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State of the Art in Montana Products Liability Law

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I. INTRODUCTION

The United States District Court for the District of Montana recently certified an important question of products liability law to the Montana Supreme Court. United States Senior District Judge Paul J. Hatfield certified the following question:

> In a strict products liability case for injuries caused by an inherently unsafe product, is the manufacturer conclusively presumed to know the dangers inherent in his product, or is state-of-the-art evidence admissible to establish whether the manufacturer knew or through the exercise of reasonable human foresight should have known of the danger?[1]

Because the issue of the admissibility of state-of-the-art evidence in a products liability case is important to the jurisprudence of products liability law in Montana but is an unresolved question, the issue warrants analysis. This essay undertakes that effort.

The piece first affords a brief overview of state of the art. The essay next examines the origins and development of products liability law in Montana and whether the Montana Supreme Court or the Montana Legislature has expressly addressed the issue of state of the art. Finding that the court has spoken with greater specificity than the legislature but that neither entity has treated the question with much particularity, the paper then evaluates additional sources of law which the Montana Supreme Court might consult in resolving this issue. The essay concludes with suggestions for how the court should resolve the question of the admissibility of state of the art in Montana.

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* Professor of Law, University of Montana. I wish to thank Chris Flann and Hank Waters for valuable research, Cecelia Palmer and Charlotte Wilmerton for processing this piece, as well as Ann and Tom Boone and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. *See* Sternhagen v. Dow Co., No. CV-88-158 GF (D. Mont. filed Apr. 1, 1996) (Order of Certification) [hereinafter Order]. Judge Hatfield's certification order included a five-page discussion of his "opinion that the state-of-the-art defense is entirely inconsistent with the doctrine of strict liability in tort as developed in the State of Montana." *Id.* at 3.

II. A WORD ABOUT STATE OF THE ART

An important question at the outset is what is the question. American jurisdictions treat state of the art in numerous different ways.[2] State courts variously define "state of the art." Most jurisdictions consider it to be the knowledge reasonably available, or the safest existing technology adapted for use, at the time of the product's manufacture,[3] while numerous states define state of the art as industry knowledge, custom or practice.[4] Some states also seem to find important the specific type of defect at issue, treating rather differently design defects and inadequate warnings. Moreover, a few jurisdictions apparently consider significant the particular product alleged to be defective. For example, states may distinguish necessities from luxuries or health care products from asbestos. Nonetheless, the national jurisprudence remains so fractured that clear patterns involving product types are very difficult to identify.

Most jurisdictions impose on manufacturers a "duty to warn only of risks that were known or should have been known to a reasonable person,"[5] thereby making state of the art admissible in products liability cases alleging failure to warn. However, some states charge manufacturers with that knowledge which is available at the time of trial, regardless of whether defendants "knew or reasonably could have known of the risk,"[6] thus considering state of the art inadmissible.

Many of those jurisdictions which recognize state of the art treat it as an affirmative defense and permit manufacturers to show that they did not know and could not have discovered that their products were defective in light of existing scientific or

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2. I rely in this section on RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, Mar. 13, 1995) [hereinafter Tentative Draft]. With the exception of Montana, I emphasize in this essay case law—common law, not statutory, development of the state of the art idea. Statutory articulation of the concept in other states should have limited relevance to the Montana Supreme Court's resolution of the question certified as a matter of common law.

3. *See, e.g.*, Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 559 (Cal. 1991); Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1175 (Colo. 1993). *See generally* Tentative Draft, *supra* note 2, at 88.

4. *See, e.g.*, Smith v. Minster Machine, 699 F.2d 628, 633 (10th Cir. 1981); Beech v. Outboard Marine Corp., 584 So. 2d 447, 450 (Ala. 1991). *See generally* Tentative Draft, *supra* note 2, at 88.

5. Tentative Draft, *supra* note 2, at 120. *Anderson*, 810 P.2d at 549, is illustrative.

6. *See* Tentative Draft, *supra* note 2, at 122. *In re* Hawaii Federal Asbestos Cases, 699 F. Supp. 233, 235-36 (D. Haw. 1988), *aff'd sub nom. In re* Hawaii Federal Asbestos Cases v. Raymark Ind., 960 F.2d 806 (9th Cir. 1992), is illustrative.

technological knowledge. New Jersey is the leading state which considers state of the art as an aspect of plaintiff's affirmative cause of action, making state of the art relevant to, but not dispositive of, the risk-utility balancing test of whether a product is defective.[7]

Insofar as possible, I attempt to analyze the particular product at issue, 2,4-D, and to assess the defect alleged, failure to warn, in the *Sternhagen* case. I also attempt to answer the questions posed as Judge Hatfield certified them.[8] Moreover, I rely on certain aspects of the judge's discussion that in his opinion the "state-of-the-art defense is entirely inconsistent with the doctrine of strict liability in tort as developed in the State of Montana."[9]

III. ORIGINS AND DEVELOPMENT OF MONTANA PRODUCTS LIABILITY LAW

A. The Montana Case Law Jurisprudence

The origins and development of Montana products liability case law warrant considerable treatment here because that products liability jurisprudence will facilitate resolution of the issue of the admissibility of state of the art. This is true, even though Montana products jurisprudence does not address state of the art very specifically, and the history of Montana products liability law has been rather comprehensively assessed elsewhere.[10]

The Montana Supreme Court first recognized strict liability in tort under Section 402A of the Restatement Second of Torts in the landmark 1973 case of *Brandenburger v. Toyota Motor Sales*.[11] The court expressly enumerated a list of public policy rationales on which it relied to justify the adoption of strict lia-

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7. *See* O'Brien v. Muskin Corp., 463 A.2d 298, 305 (N.J. 1983); *see also* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 44-45 (Alaska 1979).

8. In theory, the Montana Supreme Court apparently has the discretion to reformulate questions that the Montana Federal District Court certifies. *See* MONT. R. APP. P. 44. However, in practice, the Montana Supreme Court has apparently not reformulated questions but rather has refused to accept questions that the Montana Federal District attempted to certify which the Montana Supreme Court might have reformulated. Interview with Professor William F. Crowley, University of Montana School of Law, in Missoula, MT. (June 14, 1996).

9. *See* Order, *supra* note 1, at 3.

10. *See, e.g.*, William O. Bronson, *Developments in Montana Products Liability Law, 1977-1987*, 48 MONT. L. REV. 297 (1987); Carl W. Tobias & William A. Rossbach, *A Framework For Analysis of Products Liability in Montana*, 38 MONT. L. REV. 221 (1977).

11. 162 Mont. 506, 513 P.2d 268 (1973).

bility under Section 402A in *Brandenburger*.[12] These included the defendant's superior ability to prevent defects and to pay for the injuries that defects cause, particularly in contrast with consumers whom defective products harm.[13] The public policies have been especially important to the development of Montana products liability jurisprudence because the Montana Supreme Court has adverted to the policies when resolving untreated specific issues of products liability law in subsequent cases.[14]

The Montana Supreme Court has issued numerous products liability opinions in the twenty-three years since it decided *Brandenburger;* however, the court has not addressed the question of state of the art's admissibility with much specificity during that period. *Rix v. General Motors Corporation*[15] is the case which is most relevant to state of the art, but even that opinion addresses the issue rather obliquely.

In *Rix*, plaintiff alleged that the defendant's single brake system which was offered as a standard feature was defectively designed because the defendant had the "knowledge, capacity, and capability to incorporate a split (dual) brake system, and in fact did so as optional equipment if ordered by [the] purchasers."[16] The plaintiff also claimed that the "accident would have been less severe or would not have happened had the truck been equipped with a dual system."[17]

The Montana Supreme Court purported to "render an opinion only with regard" to whether the "single brake system [was] defective and unreasonably dangerous in view of the fact that a dual brake system was technologically feasible at the time of manufacture and was offered" for sale by the defendant.[18] The

12. The court reproduced from an Arizona case eight policy "reasons for the application of the doctrine of strict liability." *Brandenburger*, 162 Mont. at 514-15, 513 P.2d at 273 (citing Lechuga, Inc. v. Montgomery, 467 P.2d 256, 261 (Ariz. Ct. App. 1970) (Jacobson, J., concurring)).

13. *See id.* These rationales also included the public interest in discouraging the marketing of defective products and in placing responsibility on manufacturers that are responsible for products reaching the market and the difficulty that plaintiffs have in proving that products were negligently manufactured. *See id.*

14. *See, e.g.*, McJunkin v. Kaufman & Broad Home Systems, 229 Mont. 432, 442-45, 748 P.2d 910, 916-18 (1987); Streich v. Hilton-Davis, 214 Mont. 44, 51-52, 692 P.2d 440, 444 (1984); Brown v. North Am. Mfg. Co., 176 Mont. 98, 109-11, 576 P.2d 711, 718-19 (1978).

15. 222 Mont. 318, 723 P.2d 195 (1986).

16. *Rix*, 222 Mont. at 322-23, 723 P.2d at 198.

17. *Id.* at 323, 723 P.2d at 198.

18. *Id.* at 327, 723 P.2d at 201. "We do not rule upon the fact situation where a claim of design defect is made and where no alternative design is technologically feasible." *Id.* The court cited O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983),

court refused to "define design defect by the terminology of unreasonably dangerous design or defective design"[19] but suggested that "balancing of various factors is required by a jury."[20]

The Montana Supreme Court provided "certain elements [that] should be considered for instructional purposes in an alternative design products liability case" by judges and juries.[21] The court specified five factors: the reasonable probability that the product as originally designed would seriously harm the plaintiff; a comparison of this probability with the risk posed by the alternative design; comparison of the relative costs both to the manufacturer and consumer of the two designs; the technological feasibility of the alternative design; and the time reasonably required to implement this design.[22] However, the court admonished that "not all factors may be appropriate in every case," that "additional factors should be considered" when proper, and that district judges should supplement the factors in light of the proof submitted during trials.[23]

The Montana Supreme Court did observe in *Rix* that a "design is defective if at the time of manufacture an alternative designed product would have been safer than the original designed product and was both technologically feasible and a marketable reality."[24] However, the court made this statement in the context of deciding whether evidence of a manufacturer's subsequent remedial measures was admissible under Rule 407 of the Montana Rules of Evidence.[25] Moreover, the court specifically observed that it was restating the opinion's earlier analysis of the narrow issue of design defect in an alternative design case in which the defendant actually produced a technologically feasible

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which suggests that a plaintiff could prevail in that situation, particularly when the product has limited utility.

19. *Rix*, 222 Mont. at 327, 723 P.2d at 201. "[W]e do not find these tests to be helpful and choose not to adopt them." *Id.*

20. *Id.* at 328, 723 P.2d at 201. The court was apparently subscribing to the risk-utility balancing test which most jurisdictions apply. *See* Tentative Draft, *supra* note 2, at 50-51. Dean John Wade developed a list of seven factors on which many courts rely when applying risk-utility balancing in duty-to-warn cases. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973). Case examples are *O'Brien*, 463 A.2d at 304-05; Roach v. Kononen, 525 P.2d 125, 128-29 (Or. 1974).

21. "A jury should be instructed to weigh various factors according to the facts of each case and their own judgment." *Rix*, 222 Mont. at 328, 723 P.2d at 201.

22. *See Rix*, 222 Mont. at 328, 723 P.2d 201-02.

23. *Id.*

24. *Rix*, 222 Mont. at 330, 723 P.2d at 202.

25. *See Rix*, 222 Mont. at 330, 723 P.2d at 202-03; *see also* MONT. R. EVID. 407.

alternative design at the time of manufacture.[26] In *Krueger v. General Motors Corporation*,[27] the Montana Supreme Court reiterated the proposition from *Rix* included in this paragraph's first sentence when resolving an issue relating to the admissibility of evidence that resembled the evidentiary question which the court had treated in *Rix*.[28]

Several difficulties attend efforts to rely on the pronouncements in *Rix* when deciphering the state-of-the-art idea in Montana. First, the Montana Supreme Court never specifically mentioned the concept. Second, the court was addressing a narrowly circumscribed and relatively straightforward factual situation in which defendant actually manufactured a technologically feasible alternative at the time of sale. Third, the Montana Supreme Court afforded rather generalized guidance that may have somewhat limited applicability.

The *Rix* decision includes the pronouncements of the Montana Supreme Court which seem most applicable to state of the art. Additional particular opinions and the general tenor of the Montana case law jurisprudence do address state of the art less specifically. Perhaps most important are the Montana Supreme Court's longstanding insistence that the basis of products liability for defective products under Section 402A and *Brandenburger* in Montana is strict liability in tort, not negligence, and the court's continuing invocation of, and adherence to, the public policies which underlie strict liability in tort, particularly as articulated in *Brandenburger*.[29]

Numerous aspects of the Montana Supreme Court's products

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26. *See Rix*, 222 Mont. at 328, 723 P.2d at 202; *see also supra* notes 16-23 and accompanying text.

27. 240 Mont. 266, 783 P.2d 1340 (1989).

28. *Id.* at 274, 783 P.2d at 1345. The court in *Krueger*, 240 Mont. at 273, 783 P.2d at 1345, and *Rix*, 222 Mont. at 326, 723 P.2d at 200, invoked an earlier case for the idea that "design is judged not by the condition of the product, but the state of scientific and technological knowledge available to the designer at the time the product was placed on the market." *See* Kuiper v. Goodyear Tire & Rubber Co., 207 Mont. 37, 62, 673 P.2d 1208, 1221 (1983). The issue—the proof that a plaintiff must make in a design defect case—to which the *Kuiper* court applied the idea of the state of scientific and technological knowledge available at the time of marketing is more removed from state of the art than the issue of subsequent remedial measures. Tacke v. Vermeer Mfg. Co., 220 Mont. 1, 5, 713 P.2d 527, 530 (1986), also specifically mentions state of the art when alluding to plaintiff's proof: "Plaintiff presented expert testimony to demonstrate that . . . the design was unnecessary in the first place because Vermeer and others had successfully designed and sold balers without compression rollers and the state of the art would have allowed it in 1975 when the baler was purchased."

29. *See supra* notes 11-14 and accompanying text.

jurisprudence illustrate the court's ongoing belief that products liability sounds in strict liability, rather than negligence. For example, the Montana Supreme Court has twice held that strict liability in tort applies to consumer disappointment with products that cause no personal injury,[30] although the overwhelming majority of states relegate plaintiffs to commercial law remedies in this situation.[31] The court has correspondingly scrutinized the trial by district courts of several products cases to insure that the trial judges did not improperly inject negligence concepts into strict liability cases.[32] Illustrative of the Montana Supreme Court's continuing reliance on policies which support strict liability in tort, especially as enunciated in *Brandenburger*, has been the court's rejection of defendants' assertion that defects' "open and obvious" nature should be a defense because the court found that this approach would encourage misdesign, thereby directly contravening an important strict liability policy.[33]

I could offer other particular cases that address, and additional examples of ways that the general tenor of the Montana products jurisprudence speaks to, state of the art less specifically than *Rix*. However, the ideas reviewed immediately above are probably most relevant. Those concepts also strongly support Judge Hatfield's "opinion that the state-of-the-art defense is entirely inconsistent with the doctrine of strict liability in tort as developed in the State of Montana."[34]

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30. *See* McJunkin v. Kaufman & Broad Home Systems, 229 Mont. 432, 748 P.2d 910 (1987); Thompson v. Nebraska Mobile Homes, 198 Mont. 461, 647 P.2d 334 (1982); *see also* Streich v. Hilton-Davis, 214 Mont. 44, 692 P.2d 440 (1984).

31. *See, e.g.*, Danforth v. Acorn Structures, 608 A.2d 1194 (Del. 1992); Chemtrol Adhesives v. American Mfrs. Mutual Ins. Co., 537 N.E.2d 624 (Ohio 1989); *see also* East River S.S. Co. v. Delaval Turbine, Inc., 476 U.S. 858 (1986). *See generally* Tentative Draft, *supra* note 2, at 175-94.

32. *See, e.g.*, Krueger v. General Motors Corp., 240 Mont. 266, 275-77, 783 P.2d 1340, 1346-47 (1989); Zahrte v. Sturm, Ruger, 203 Mont. 90, 93-94, 661 P.2d 17, 18-19 (1983); *see also* Lutz v. National Crane Corp., 267 Mont. 368, 377-82, 884 P.2d 455, 460-63 (1994); Brown v. North Am. Mfg. Co., 176 Mont. 98, 576 P.2d 711 (1977); Stenberg v. Beatrice Foods, 176 Mont. 123, 576 P.2d 725 (1977). The court has also scrutinized and reversed district court grants of summary judgment to defendants in products cases. *See* Emery v. Federated Foods, 262 Mont. 83, 863 P.2d 426 (1993); Hagen v. Dow Chem. Co., 261 Mont. 487, 863 P.2d 413 (1993).

33. *See Brown*, 176 Mont. at 106-10, 576 P.2d at 717-19; *Stenberg*, 123 Mont. at 132, 576 P.2d at 730-31; *see also Tacke*, 220 Mont. at 12-13, 713 P.2d at 534-35.

34. *See* Order, *supra* note 1, at 3.

B. Montana Legislative Developments

The Montana Legislature has addressed state of the art with even less specificity than the Montana Supreme Court. The legislature passed a products liability statute in 1987. However, that measure essentially codified the Restatement Second of Torts articulation of the affirmative cause of action, the core language of which requires that a product be in a "defective condition unreasonably dangerous."[35]

The legislation also prescribed two applicable affirmative defenses neither of which could fairly be characterized as having much relationship to the idea of state of the art.[36] The first defense applies when the product's user or consumer "discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it."[37] The second defense applies if the user or consumer unreasonably misused the product and "such misuse caused or contributed to the injury."[38]

When the Montana Supreme Court considers these statutory defenses, it should remember an especially relevant observation which Judge Hatfield included in his discussion. The judge stated: "It is imperative to note that as of 1987, the debate whether to allow evidence of the state-of-the-art in the context of a strict liability claim, it is fair to say, was raging, and the Legislature was well aware of the State of Montana's decisional law regarding strict liability claims founded upon a manufacturer's failure to warn."[39]

In sum, neither the Montana Supreme Court nor the Montana Legislature has addressed state of the art with much particularity. It may be appropriate, accordingly, to consult additional sources of law. These include the treatment of state of the

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35. *See* MONT. CODE ANN. § 27-1-719(2)-(3) (1995); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

36. *See* MONT. CODE ANN. § 27-1-719(5)(a)(1995).

37. *See* MONT. CODE ANN. § 27-1-719(5)(a) (1995).

38. *See* MONT. CODE ANN. § 27-1-719(5)(b) (1995). The two affirmative defenses "mitigate or bar recovery and must be applied in accordance with the principles of comparative negligence set forth in 27-1-702." MONT. CODE ANN. § 27-1-719(b) (1995).

39. Order, *supra* note 1, at 7. Judge Hatfield is clearly correct that many state legislatures had debated the state of the art issue by 1987. It is also arguable that the Montana Legislature's specific provision for two defenses evinced legislative intent to prescribe all available defenses and, thus, intent to not make state of the art an available defense. However, this interpretation of legislative intent ascribes comprehensiveness and clairvoyance, especially to legislative inaction, which may be unrealistic.

art, principally by appellate courts rather than legislative bodies, in other jurisdictions and in the proposed Restatement Third which the American Law Institute (ALI) is currently drafting.

IV. EXTRA-MONTANA SOURCES

A. *The Value of Additional Sources*

The Montana Supreme Court has articulated a rather fully-developed products liability jurisprudence over the nearly quarter-century since it first recognized strict liability in tort in *Brandenburger*. The court, therefore, should accord greater weight to its pronouncements than to other states' products liability law and to the formulation in the proposed Restatement Third. This is especially true because many jurisdictions' jurisprudence constitutes a complex blend of public policies that are most applicable within specific states and reflects complicated interaction between supreme courts which have articulated the common law and legislatures which have passed products liability statutes. Judicial pronouncements in other jurisdictions correspondingly deserve more weight than legislative developments because the Montana Supreme Court is resolving the questions certified in *Sternhagen* principally as a matter of common law.

Insofar as it is possible to identify a national jurisprudence of state of the art, that jurisprudence is relatively fragmented in terms, for example, of the phrase's meaning, the concept's admissibility, and state of the art's application to different types of defects and products. Moreover, the Restatement Third has not become final and remains quite controversial, while many states could reject the formulation that the American Law Institute ultimately adopts.[40] All of the above ideas suggest that the Montana Supreme Court should accord considerably more weight to its own mature jurisprudence than to these other sources of authority.

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40. *See, e.g.*, David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 746, 786-87; *A Symposium on the ALI's Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043-1454 (1994); *Symposium The Revision of the Restatement (Second) of Torts Section 402A*, 10 TOURO L. REV. 1-237 (1993); *ALI Approves Product Liability Draft, Takes First Step on New Family Law Project*, 63 U.S.L.W. 2734 (1995) [hereinafter *ALI Approves*].

B. Other States

A significant majority of jurisdictions in the United States require manufacturers to warn only of risks of which they knew or should reasonably have known, thus considering state of the art to be admissible in products liability cases alleging failure to warn.[41] Most of these states treat state of the art as an affirmative defense and impose on defendants the burden of showing that they did not know and could not have discovered that their products were defective in light of existing scientific or technological knowledge.[42] The jurisdictions seem to premise treatment of state of the art primarily on principles of fairness, believing that it is inequitable to require a defendant to warn of a condition of which defendant was unaware and that so doing would essentially impose "absolute liability."[43] This view also seems to partake more of negligence than strict liability.[44]

Some states charge manufacturers with the knowledge that is available at the time of trial "without regard to whether the defendant knew or reasonably could have known of the risk."[45] These jurisdictions treat state of the art as inadmissible in products cases alleging failure to warn.[46] The states appear to rely substantially on the policy arguments which underlie Section 402A, principally that strict liability law is intended to protect consumers who are injured by defective products and who have less ability than manufacturers to guard against defects and to bear the costs of injuries which defects cause.[47]

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41. The reporters for the Restatement Third claim that "an overwhelming majority of jurisdictions support the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person." Tentative Draft, *supra* note 2, at 120. Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 559 (Cal. 1991), is illustrative; however, it is the only case cited from a leading jurisdiction. Moreover, the reporters cite only a few more cases that stand for the majority proposition than stand for the minority view, *see infra* note 45 and accompanying text, even though the reporters attribute the former view to "an overwhelming majority of jurisdictions." *See* Tentative Draft, *supra* note 2, at 120-22 (citing case law).

42. *See, e.g.*, *Anderson*, 810 P.2d at 553-60; Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1175 (Colo. 1993).

43. *See, e.g.*, *Anderson*, 810 P.2d at 553-50; *Fenton*, 845 P.2d at 1172-75.

44. *See, e.g.*, Johnson v. American Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986), *aff'd*, 758 P.2d 206 (Kan. 1988); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 640 (Md. 1992).

45. Tentative Draft, *supra* note 2, at 122. *In re* Hawaii Federal Asbestos Cases, 699 F. Supp. 233, 235-36 (D. Haw. 1988), *aff'd sub nom. In re* Hawaii Federal Asbestos Cases v. Raymark Ind., 960 F.2d 806 (9th Cir. 1992), is illustrative.

46. *See, e.g.*, *In re Hawaii Federal Asbestos Cases*, 699 F. Supp. at 235-36; Ayers v. Johnson & Johnson, 818 P.2d 1337, 1346 (Wash. 1992).

47. *See, e.g.*, Hayes v. Ariens Co., 462 N.E.2d 273, 277-78 (Mass. 1984);

A few states consider state of the art to be admissible in products liability warning cases as an aspect of plaintiff's affirmative cause of action. The New Jersey Supreme Court has been the foremost proponent of this view. The court has treated state of the art as relevant to, but not dispositive of, the risk-utility balance test of whether a product is defective, while the court has imposed on plaintiff the ultimate burden of proving defect but placed the burden on the "defendant to prove that compliance with state-of-the-art, in conjunction with other relevant evidence, justifie[d] placing a product on the market."[48]

C. *The Restatement Third of Torts*

The proposed Restatement Third warrants relatively limited treatment here because the ALI has not finalized its work, the draft which the Institute will probably adopt will be controversial, and I have mentioned above the proposed Restatement and the ALI effort.[49] The core language that governs warnings which the reporters included in section two of the proposal and which the ALI has adopted in principle essentially embodies the state of the art idea.[50] Section 2(c) specifically provides that a "product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings [and their omission] renders the product not reasonably safe."[51] This phrasing by definition re-

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Beshada v. Johns-Manville Prods., 447 A.2d 539, 546-49 (N.J. 1982).

48. *See* O'Brien v. Muskin Corp., 463 A.2d 298, 305 (N.J. 1983). As to design defects, the reporters find that a "few states take the position that conformance with the best available technology in actual use is an absolute defense to design liability [or] that evidence that a risk was beyond the scope of scientific knowability at the time of manufacture is inadmissible." Tentative Draft, *supra* note 2, at 89. Woodill v. Parke Davis & Co., 402 N.E.2d 194, 199 (Ill. 1980), is illustrative of states that treat state of the art as an absolute defense. Johnson v. Raybestos-Manhattan, 740 P.2d 548, 549 (Haw. 1987), is illustrative of states that treat state of the art as inadmissible. However, most jurisdictions make state of the art relevant to plaintiff's proof of an affirmative cause of action or to defendant's proof of an affirmative defense. *See, e.g., O'Brien*, 463 A.2d at 305 (making relevant to plaintiff's proof); Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 559 (Cal. 1991) (making relevant to defendant's proof). *See generally* Tentative Draft, *supra* note 2, at 89.

49. *See, e.g., supra* note 40 and accompanying text (suggesting ALI work controversial and not final); *supra* notes 2-6, 31, 40-41, 48 (mentioning proposed Restatement or ALI effort).

50. *See* Tentative Draft, *supra* note 2, § 2(c); *see also ALI Approves*, *supra* note 40 (suggesting ALI adopted in principle).

51. Tentative Draft, *supra* note 2, § 2(c).

lieves manufacturers of liability for failing to warn of unforeseeable risks.

There are several reasons why the proposed Restatement Third's treatment of state of the art is controversial. First, this approach favors the interests of product manufacturers over product consumers. Second, the resolution effectively institutes a negligence, rather than a strict liability, regime for products liability in the context of failure to warn of allegedly unknown risks at the time of manufacture. Third, the treatment underemphasizes important public policies, such as consumer protection and compensation, which underlie the imposition of strict liability in tort for defective products.

V. SUGGESTIONS FOR THE FUTURE

The Montana Supreme Court should treat state of the art evidence as inadmissible in failure to warn cases, if the court wants to resolve the state of the art issue in a manner that is most compatible with the products liability jurisprudence which it has developed to date. This approach would best implement the idea that products liability sounds in strict liability, not negligence, which the Montana Supreme Court has clearly articulated and steadfastly applied in many specific products liability cases since first recognizing strict liability in *Brandenburger*.[52] The resolution would also effectuate the public policy rationales including, for example, consumer protection and compensation, that support strict liability and that the court has consistently honored and enforced in numerous cases over the last twenty-three years.[53] Moreover, the perspective's adoption would be responsive to related and additional public policies—such as encouraging increased manufacturer safety research, risk spreading, avoiding accidents, and minimizing the potential for confusion in the fact-finding process—on which a number of jurisdictions have relied when holding state of the art inadmissible.[54]

Should the Montana Supreme Court believe that making state of the art evidence inadmissible imposes too strict liability or reject this view on other grounds, the court might want to

52. *See supra* notes 11-14, 29-32 and accompanying text.

53. *See supra* notes 11-14, 33 and accompanying text.

54. Beshada v. Johns-Manville Prods., 447 A.2d 539, 547-49 (N.J. 1982), affords the most thorough rendition of these public policies; *see also In re* Hawaii Federal Asbestos Cases, 699 F. Supp. 233, 235-38 (D. Haw. 1988), *aff'd sub nom. In re* Hawaii Federal Asbestos Cases v. Raymark Ind., 960 F.2d 806 (9th Cir. 1992).

address state of the art by harmonizing its prior products liability jurisprudence with additional states' treatment of the concept. The court could do so by rejecting state of the art as a defense and by considering state of the art as part of the plaintiff's affirmative case while making state of the art relevant to, but not dispositive of, the risk-utility balancing test in ascertaining whether the defendant placed a defective product in the stream of trade.[55] The Montana Supreme Court should impose on the plaintiff the ultimate burden of proving that a product is defective. However, the court ought to place on the defendant the burden of proving that compliance with state of the art, together with other relevant evidence, such as the product's utility, justified marketing the product. State of the art should be defined as the scientific or technological knowledge which was reasonably available at the time of manufacture. Because the resolution recommended is rather general, I attempt to afford more specific guidance by consulting helpful, applicable case law, namely the Montana Supreme Court's decision in *Rix* and the New Jersey Supreme Court's opinion in *O'Brien*.[56]

The *Rix* court—when prescribing a risk-utility analysis in a vehicular alternative design case, a factual situation that sharply contrasts with the inadequate warnings regarding the risks of 2,4-D which are at issue in *Sternhagen*—suggested that trial judges instruct juries to "weigh various factors according to the facts of each case and their own judgment."[57] The court then provided elements which trial judges ought to consider for "instructional purposes in an alternative design products liability case," while it recognized that all of the factors might not apply in every circumstance, that others should be considered when appropriate and that trial courts ought to augment the factors afforded based upon the proof submitted during trials.[58]

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55. I rely substantially in the remainder of this paragraph on Rix v. General Motors Corp., 222 Mont. 318, 327-28, 723 P.2d 195, 200-202 (1986), and on O'Brien v. Muskin Corp., 463 A.2d 298, 304-06 (N.J. 1983).

56. *See Rix*, 222 Mont. at 318, 723 P.2d at 195; *O'Brien*, 463 A.2d at 298. It bears emphasizing that the *Rix* court only purported to address the narrow issue of alternative design in a vehicular design defect case and that *O'Brien* principally involved a design defect in an above-ground swimming pool. Moreover, few states subscribe to the *O'Brien* position, while the New Jersey jurisprudence is complex and unclear. *Compare Beshada v. Johns-Manville Prods.*, 447 A.2d 539 (N.J. 1982) *with* Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984); *see also* N.J. STAT. ANN. 2A:58C-3 to C-4 (West 1987). Nevertheless, it is possible to extrapolate from the helpful guidance in *Rix* and *O'Brien* to the state of the art question in the warning context. *See also supra* notes 15-26, 48 and accompanying text.

57. *Rix*, 222 Mont. at 328, 723 P.2d at 201.

58. *Id.* at 328, 723 P.2d at 201-02; *see also supra* note 22 and accompanying

The *O'Brien* court—when prescribing a risk-utility analysis in a case principally implicating design defects in an above-ground swimming pool, a factual scenario that also markedly differs from *Sternhagen*—enumerated seven elements which it characterized as "some factors relevant in risk-utility analysis."[59] The New Jersey Supreme Court then examined the applicability of state of the art in the context of risk-utility balancing. It observed that "state-of-the-art relates to both components of the risk-utility equation."[60]

The court stated that the "risk side of the equation may involve, among other factors, risks that the manufacturer knew or should have known would be posed by the product as well as the adequacy of any warnings."[61] The New Jersey Supreme Court found that the equation's "utility side generally will include an appraisal of the need for the product and available design alternatives."[62] Assessment of a product's utility also implicates the relative need for it; "some products are essentials, while others are luxuries."[63] The court explained that a product which fulfills a crucial need and is susceptible to only one design should be treated differently than a luxury item.[64]

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text (examining five factors *Rix* afforded).

59. *O'Brien*, 463 A.2d at 304. The seven elements were:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 304-05; *see also supra* notes 20-23 (affording additional analysis of factors, especially those that Dean Wade developed and courts apply).

60. *O'Brien*, 463 A.2d at 305.

61. *Id.*

62. The court stated that the "assessment of the utility of a design involves the consideration of available alternatives. If no alternatives are available, recourse to a unique design is more defensible. The existence of a safer and equally efficacious design, however, diminishes the justification for using a challenged design." *Id.*

63. *Id.* at 306.

64. *Id.* The court stated:

The New Jersey Supreme Court then afforded illustrative guidance "in a design-defect case [involving] above-ground swimming pools"[65] which resembled somewhat the *Rix* court's guidance "for instructional purposes in an alternative design products liability case."[66] The *O'Brien* court stated that a plaintiff seeking to make out a *prima facie* case should "adduce sufficient evidence on the risk-utility factors to establish a defect."[67] As to the product at issue, for instance, the court suggested that plaintiff might attempt to show that:

> pools are marketed primarily for recreational, not therapeutic purposes; that because of their design, including their configuration, inadequate warnings, and the use of vinyl liners, injury is likely; that, without impairing the usefulness of the pool or pricing it out of the market, warnings against diving could be made more prominent and a liner less dangerous.[68]

The New Jersey Supreme Court added that plaintiff may not have to "introduce evidence on all of those alternatives" and might want to offer proof regarding other considerations which are relevant to risk-utility balancing.[69]

Because *Rix* and *O'Brien* afford comparatively general guidance relating more specifically to risk-utility balancing in factual contexts which differ substantially from that in *Sternhagen*, I shall attempt to extrapolate from those two cases and the design defect scenarios which they presented to inadequate warnings. State of the art should not afford a defense but ought to be considered part of plaintiff's affirmative cause of action. The plaintiff should assume the ultimate burden of proving that a product is defective because it lacked adequate warnings in light of the relevant risk-utility factors. The defendant ought to have the

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> Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible.

O'Brien, 463 A.2d at 306.

65. *See id.*

66. Rix v. General Motors Corp., 222 Mont. 318, 328, 723 P.2d 195, 201 (1986); *see also supra* notes 15-28, 56-57 and accompanying text (evaluating *Rix*'s guidance). It bears reiterating that the defects alleged and the products involved in *Rix* and *O'Brien* differ significantly from those in *Stenberg*.

67. *O'Brien*, 463 A.2d at 306.

68. *Id.*

69. *Id.* The court also provided guidance regarding resolution of motions to dismiss. *See id.*

burden of proving that compliance with state of the art, in conjunction with additional applicable evidence relating to risk and utility, supported the product's marketing.

The plaintiff might make numerous more specific showings to satisfy the risk-utility factors. For example, plaintiff could adduce evidence regarding the "user's ability to avoid danger by the exercise of care in the use of the product [as well as] the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions."[70] The plaintiff might also attempt to show that the manufacturer could have inexpensively afforded warnings that would not have impugned the product's integrity.[71]

The defendant may offer a number of more particular showings in light of the risk-utility factors. The defendant could introduce evidence that lack of reasonably available scientific or technological knowledge respecting the harmful properties of 2,4-D at the time of manufacture complicated the defendant's efforts to provide specific warnings.[72] The defendant might claim that this lack of knowledge similarly prevented it from appreciating that the product could cause injury or the seriousness of that harm, much less institute precautions to minimize relevant risks.[73]

Both the plaintiff and the defendant may wish to make several more specific showings relating to the risk-utility factors. For instance, each party would want to adduce evidence regarding the "usefulness and desirability of the product—its utility to the user and to the public as a whole."[74] This idea directly implicates the concomitant notion of the "availability of a substitute product which would meet the same need and not be as unsafe."[75] In the final analysis, the jury may be weighing the ben-

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70. These are the fifth and sixth factors in *O'Brien*, 463 A.2d at 304; *see also supra* note 59.

71. These implicate the fourth factor in *O'Brien*, 463 A.2d at 304; *see also supra* note 59, and subfactors (c) and (d) of the third factor in *Rix*, 222 Mont. at 328, 723 P.2d at 201-02; *see also supra* text accompanying note 22. Plaintiff may also want to show that additional testing or inquiry by the manufacturer might have cured or ameliorated the lack of knowledge of a product's dangerous propensities.

72. This implicates the factors listed in note 71, *supra*.

73. These implicate the second factor in *O'Brien*, 463 A.2d at 304; *see also supra* note 59, and subfactors (a) and (b) of the third factor in *Rix*, 222 Mont. at 318, 723 P.2d at 201; *see also supra* text accompanying note 22.

74. This is the first factor in *O'Brien*, 463 A.2d at 304; *see also supra* note 59. In other words, how important was 2,4-D to the individuals involved, to agriculture and to society?

75. This is the third factor in *O'Brien*, 463 A.2d at 204; *see also supra* note 59,

efits of 2,4-D's application against the risk of harm to which the product's use exposed plaintiff and the injury that plaintiff ultimately suffered.

It is difficult to afford much more specific guidance, particularly regarding the product and the defect at issue in *Sternhagen*; however, a few ideas can be offered. The judge should charge the jury to apply the risk and utility factors to the evidence which the plaintiff and the defendant presented and to decide whether plaintiff proved that the product was defective because it lacked adequate warnings. The jury would resolve the issue of defectiveness by consulting the proof adduced as to the risk and utility factors examined above and other considerations which might be applicable in ascertaining whether risk outweighed utility. Defendant's evidence regarding state of the art may be important to the jury's deliberations. However, state of the art would not be an affirmative defense but would only be relevant to the jury's efforts to strike the risk-utility balance in ascertaining whether the product was defective due to inadequate warnings.

Several ideas support the treatment of state of the art which I propose immediately above. First, the approach suggested essentially honors the jurisprudence of products liability law that the Montana Supreme Court has carefully developed over the last twenty-three years. Second, this resolution would allow for the implementation of products liability's underlying public policy rationales, particularly those relating to the compensation of consumers for injuries inflicted by defective products and to manufacturers' superior ability to absorb these costs.

Third, the treatment recommended is fair, especially because it accommodates the interests of plaintiffs whom defective products have allegedly injured and manufacturers of these products. For example, the approach is a compromise between the "stricter liability" view, making state of the art inadmissible, which some courts and writers characterize as absolute liability,[76] and the "lenient" perspective, making state of the art admissible and effectively a complete defense, which certain courts and commentators describe as negligence.[77]

The resolution proposed is equitable, therefore, because it

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and subfactors (b)-(e) of the third factor in *Rix*, 222 Mont. at 318, 713 P.2d at 201-02; *see also supra* text accompanying note 22. In other words, were there safer, equally effective alternatives to 2,4-D?

76. *See supra* notes 43, 45-47 and accompanying text.

77. *See supra* notes 41-44 and accompanying text.

allows judges and juries to accord some weight to state of the art as one aspect of an overall balancing of numerous factors in the risk-utility calculus. The approach also permits manufacturers which typically have superior information, particularly regarding their own design and manufacturing processes, scientific and technological knowledge that was available at the time of manufacture and the relevant industry, to present this material, even as the solution enables plaintiffs to rebut this evidence or to show the availability of other alternatives involving design or warning or of additional scientific or technological information. Moreover, the treatment recommended strikes a fair balance between plaintiffs and defendants because it will allow some plaintiffs to recover even when manufacturers lack knowledge of pertinent risks by making state of the art relevant to, but not dispositive of, the risk-utility balancing test.

VI. CONCLUSION

The Montana Supreme Court has accepted the Montana Federal District Court's certification of the important issue of admissibility of state of the art in products liability cases which allege failure to warn. The Montana Supreme Court should resolve this question primarily by relying on its carefully-considered products liability jurisprudence developed since 1973. This approach should lead the court to treat state of the art as inadmissible or as one aspect of the risk-utility balancing test of whether a product was defective because it lacks adequate warnings.